



NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY

Volume 18 | Issue 5

Article 6

12-1-2016

Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality

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**REQUIRING MUTUAL ASSENT IN THE 21ST CENTURY: HOW TO
MODIFY WRAP CONTRACTS TO REFLECT CONSUMER’S REALITY**

Matt Meinel^{*}

“Mutual manifestation of assent . . . is the touchstone of contract.”¹ The manifestation of mutual assent has evolved throughout history to accommodate mass commercialization and technological change. However, new problems have emerged with the rise of Internet contracting. Consumers, facing increasing numbers of inconspicuous and obtuse contract offers, are oblivious to many of the procedural and substantive rights they forfeit through their everyday activities. Intention to manifest mutual assent is increasingly becoming a legal fiction in cyberspace.

Courts usually refer to two well-established types of Internet contracts, but contracts rarely perfectly fit either definition, leaving courts stranded somewhere in the middle. This Recent Development argues that courts unnecessarily emphasize categorization of wrap contracts in lieu of the real legal issue: the manifestation of mutual assent. Furthermore, courts should adopt a presumption against mutual assent for cases where assent is unclear.

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¹ *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002).

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I. INTRODUCTION

While criminal law comprises most of the legal screen time in popular culture, contract law occasionally takes center stage. In the final season of the popular TV show *Parks & Recreation*,² the cast is outraged to discover that Gryzzl, an all-in-one internet search, social media, shopping, and phone company, is “data-mining” all of their personal information for the purpose of “learn[ing] everything about everyone.”³ Unfortunately, Ben Wyatt, the super-nerd city manager in the show, discovers that through a convoluted series of documents, he signed away the privacy rights of the entire town to Gryzzl.⁴ Ron Swanson, who zealously defends his own

² See generally *Parks and Recreation* (NBC television broadcast), <http://www.nbc.com/parks-and-recreation>.

³ *Parks and Recreation: Gryzzlbox* (NBC television broadcast Jan. 27, 2015).

⁴ *Id.* The relevant clause was located in sub-footnote (only viewable by magnifying glass) in an appendix to an appendix of amendment 14 to amendment C of the twenty-seventh update of 500-page user agreement granting free Wi-Fi to everyone in town.

privacy,⁵ unsympathetically admonishes Ben stating, “If you’re going to sign a legally binding document, you need to read it thoroughly.”⁶ However, Ron changes his opinion upon discovering his son inadvertently fell under the terms of use because Ron’s wife had simply used a computer.⁷ While satirical, this episode raises an increasingly real-word issue: if Ben and Ron, as diligent as they are, cannot negotiate or protect their rights with a multi-billion dollar Internet company, can anyone?⁸

The Second Circuit considered this issue in *Nicosia v. Amazon, Inc.*,⁹ where the court took a small step towards protecting consumers from unknowingly entering into contracts.¹⁰ In this case, the plaintiff, Nicosia, had purchased dietary supplements on Amazon.com that were subsequently discovered to contain a substance banned by the FDA.¹¹ The Eastern District of New York had dismissed Nicosia’s claim against Amazon because of a mandatory arbitration clause in the Conditions of Use,¹² but the Second Circuit reversed and remanded, questioning whether Nicosia assented to and therefore was bound by the Conditions of Use.¹³

This Recent Development analyzes how courts find mutual assent in online contracting, specifically arguing that courts should emphasize mutual assent when the facts lie between the two traditional Internet contracting frameworks, clickwrap and browsewrap. In *Nicosia*, the courts found that Amazon employed a “hybrid” clickwrap-browsewrap.¹⁴ However, allowing a hybrid

⁵ *Id.* In the same episode, Ron stated he refused to carry pictures of his son “where anyone could see them” lest his son’s privacy be violated.

⁶ *Id.*

⁷ *Id.*

⁸ See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS, 174 (2013) (“The oppressiveness of wrap contracts has become a joke—literally.”).

⁹ 834 F.3d 220 (2d Cir. 2016).

¹⁰ *Id.* at 238; see also *infra* Section IV.

¹¹ *Nicosia*, 834 F.3d at 226.

¹² *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 143 (E.D.N.Y. 2015).

¹³ *Nicosia*, 834 F.3d at 237–38.

¹⁴ See *id.* at 236; *Nicosia*, 84 F. Supp. 3d at 151–52.

approach to Internet contracting is not consistent with precedent, further erodes consumer protection, and achieves no practical benefits. Instead, on remand, the district court should use this opportunity to apply common law principles and find that a general presumption against assent exists when the evidence of assent is ambiguous.

This analysis proceeds in four parts. Part II reviews the development of wrap contracts and examines the confusion and problems caused when mutual assent is ambiguous. Part III critiques the hybridwrap framework, arguing that instead of focusing on labels such as hybridwrap, browsewrap, or clickwrap, the court should determine whether the proposed contract satisfied the elements of mutual assent, notice, and intent to agree. Part IV discusses the facts, arguments, and holdings of the *Nicosia* case at the district and appellate courts. The district court found clear manifestation of mutual assent through a hybridwrap, but the Second Circuit held that reasonable minds could disagree about the manifestation assent. Part V argues that courts should adopt a presumption against assent in situations similar to *Nicosia*. Such a presumption would better reflect core contract doctrine in light of the factual status of notice in online contracting. A presumption against assent, supported by precedent, would provide benefits for courts, businesses, and consumers.

II. WRAP CONTRACTS: FINDING MUTUAL ASSENT IN CYBERSPACE

This section highlights the origin of wrap contract doctrine and the challenges courts now face in applying it. First, a review of the early wrap cases provides context and foundational guidelines for today. Second, ambiguous assent exemplify the struggles courts face in applying contract law in online contexts. Third, this section then concludes by expounding the high-stakes implications of how courts apply mutual assent doctrine moving forward.

A. Basic Contract Principles & Early Wrap Cases

A transaction becomes a contract when parties mutually manifest assent to the terms of the agreement.¹⁵ Often referred to as a “meeting of the minds[,]”¹⁶ a manifestation of mutual assent requires that two parties agree to exchange promises and usually takes the form of an offer and an acceptance.¹⁷ To accept an offer, the offeree must be aware that there is an offer and that their action will be construed as an acceptance.¹⁸ When there is no actual knowledge of the offer, a consumer may have constructive notice.¹⁹ Constructive notice exists in online contract formation when “a reasonably prudent offeree in these circumstances would have known of the existence of license terms.”²⁰

The advent of the Internet and e-commerce has required courts to apply centuries-old common law principles to new mediums, but the fundamentals of contract law remain unchanged.²¹ Most

¹⁵ See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 28 (2d Cir. 2002).

¹⁶ See, e.g., *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

¹⁷ RESTATEMENT (SECOND) OF CONTRACTS §§ 18, 24, 50 (AM. LAW INST. 1981).

¹⁸ See *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 121 (2d Cir. 2012) (“As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence.”); *Specht*, 306 F.3d at 29–30 (“a consumer’s clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.”).

¹⁹ See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (citing *Specht*, 306 F.3d at 32). Courts will also use the term “inquiry notice,” which is synonymous with “constructive notice” for the purposes of this article.

²⁰ *Specht*, 306 F.3d at 31; see also *Schnabel*, 697 F.3d at 120 (“an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent.”).

²¹ *Register.com Inc., v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”); see also Woodrow Hartzog, *Website Design as Contract*, 60 AM.U.L. REV. 1635, 1644 n. 64 (2011).

relevantly, online contracts still require mutual assent.²² By applying contracts principles and case law, two primary frameworks of contract formation on the Internet have emerged: clickwrap and browsewrap.²³ In clickwrap agreements, users are presented with the actual terms of the agreement and are required to click “I agree” in order to proceed with the transaction.²⁴ Because the consumer makes a purposeful action to assent after clear notice of terms, clickwraps “expressly and unambiguously manifest” assent and are therefore enforceable contracts.²⁵ Browsewrap agreements, on the other hand, only give notice of terms through hyperlink and do not require express assent.²⁶ Thus, the case for mutual assent in browsewrap cases is more tenuous.²⁷ Unlike clickwrap, it is common for a court to hold a browsewrap agreement unenforceable.²⁸ Nevertheless, if there is constructive or

²² *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (“Mutual manifestation of assent . . . is the touchstone of contract.”).

²³ *See Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

²⁴ *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (citing *Register.com*, 356 F.3d at 402–03, 429); *see also* KIM, *supra* note 8, at 39.

²⁵ *Nicosia*, 834 F.3d at 233 (quoting *Register.com*, 356 F.3d at 429); *see also* KIM, *supra* note 8, at 39; Jessica L. Hubley, *Online Consent and the On-Demand Economy: An Approach for the Millennial Circumstance*, 8 HASTINGS SCI. & TECH. L. J. 1, 36 (2016).

²⁶ KIM, *supra* note 8, at 41; *see also Specht*, 306 F.3d at 31–32 (2d Cir. 2002) (describing what would later be termed “browse-wrap”).

²⁷ *See* Allison Brehm, *Click Here to Accept the Terms of Service*, 31 COMM. LAWYER 4, 4 (2015) (citing *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *7 (N.D. Cal. June 25, 2014) (“Generally, courts have declined to enforce browsewrap agreements because the fundamental element of assent is lacking.”); *see also* KIM, *supra* note 8, at 41; Hartzog, *supra* note 21, at 1644.

²⁸ *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178–79 (9th Cir. 2014); *see also* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 472 (2006) (“An examination of the cases that have considered browsewraps in the last five years demonstrates that the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals.”). For an early case refusing to enforce an online browsewrap agreement *see Pollstar v. Gigmania Ltd*, 170 F. Supp. 2d 974, 980–81 (E.D. Cal. 2000) (finding the terms and conditions hyperlink unidentifiable because it was “small gray text on a gray background”).

inquiry notice, courts may still find assent in browsewrap cases.²⁹ Constructive notice “depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous.”³⁰

In *Specht v. Netscape Communications Corp.*,³¹ a foundational Internet contracting case, the website at issue allowed plaintiffs to download software without viewing or agreeing to the terms of use, which contained a mandatory arbitration clause.³² However, the website had a hyperlink to the terms at the very bottom of the webpage, far enough below the download button to where the plaintiffs would have had to scroll down in their web browser to see the notice.³³ The court, in determining whether the plaintiffs were bound by the terms of use, evaluated whether a “reasonably prudent offeree in [the] plaintiffs’ position” would have had notice of the terms prior to downloading.³⁴ Concerned about maintaining “manifestation of assent . . . [as] the touchstone of contract,”³⁵ the court asserted that requiring reasonably conspicuous notice of terms and unambiguous assent was essential for contract validity.³⁶ The court noted that the downloading itself was not sufficient to form a contract.³⁷ Therefore, because the plaintiffs could download without viewing the notice, and the notice was invisible unless the plaintiffs scrolled further than they had reason to, the court held

²⁹ *Nguyen*, 763 F.3d at 1177 (“[T]he validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”); see also KIM, *supra* note 8, at 41.

³⁰ *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (citing *Nguyen*, 763 F.3d at 1177–78).

³¹ 306 F.3d 17 (2d Cir. 2002).

³² *Id.* at 22–23 (2d Cir. 2002).

³³ *Id.* at 23–24.

³⁴ *Id.* at 20, 35.

³⁵ *Id.* at 29 (citing RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (AM. LAW INST. 1981)) (“The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”).

³⁶ *Id.* at 35.

³⁷ *Id.* at 20, 29–30 (“[C]licking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.”).

that the reasonably prudent offeree would not have notice of the terms, and thus there was no contract.³⁸ With the holding in *Specht*, the Second Circuit laid the foundation for browsewrap and its general unenforceability.³⁹ But, legal tension continues to grow as courts and parties find themselves ambiguously in between enforceable clickwrap agreements on one side and unenforceable browsewrap claims on the other.

B. The Rise of Hybridwrap Cases

When cases meet the traditional definitions of clickwrap or browsewrap agreements, the legal analysis regarding contract formation is straightforward. Courts find clickwrap agreements to be enforceable contracts and browsewrap agreements to be unenforceable. Increasingly, however, courts are encountering cases where a “browsewrap agreement resembles a clickwrap agreement.”⁴⁰ This occurs when the user is doing more than just passively browsing a website without any notice; therefore the use does not meet the classic browsewrap definition, but it also does not strictly meet the traditional clickwrap definition. When confronted with these facts, courts have started looking for a middle ground in their analysis of these mixed agreements—the hybridwrap.⁴¹ The next two cases are examples of when courts applied “hybridwrap” analysis but achieved different results.

³⁸ *Id.* at 20, 30–31.

³⁹ *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176–77 (9th Cir. 2014) (“Where the link to a websites terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement.”); *see also* KIM, *supra* note 8, at 42.

⁴⁰ *Nguyen*, 763 F.3d at 1176 (“Courts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.”).

⁴¹ *See, e.g., Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 151 (E.D.N.Y. 2015).

In *Meyer v. Kalanick*,⁴² the plaintiff allegedly agreed to a mandatory arbitration clause and class action ban when he created a rider account with Uber using a smartphone app, but the plaintiff argued there was insufficient notice that he was agreeing to the terms.⁴³ On the registration screen requiring the plaintiff to enter his payment information, there was a “Register” button, and at the bottom of the screen, there was the following notice: “By creating an Uber account, you agree to the Terms of Service & Privacy Policy.”⁴⁴ The court determined the notice was “barely legible[,]” and it did not take the user directly to the terms and conditions even when the link was followed.⁴⁵ Thus, the court found that because of the relative obscurity of the Terms of Service statement, there was not reasonable notice.⁴⁶

In contrast to *Meyer*, the court in *Fteja v. Facebook* found a valid contract.⁴⁷ Facebook sought to transfer the case to the Northern District of California pursuant to a forum selection clause found in its Terms of Policy.⁴⁸ While creating his Facebook account, the plaintiff clicked a “Sign Up” button with the following language directly below it: “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.”⁴⁹ The phrase “Terms of Service” was a hyperlink to a page containing the full terms.⁵⁰ After reviewing both browsewrap and clickwrap doctrine, the court determined that the plaintiff had sufficient notice of the terms and that his click would be construed as assent to them, thereby binding himself to the forum selection clause.⁵¹ Because hybridwraps allow companies to have enforceable contracts without the burdens of clickwrap,

⁴² 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921 (S.D.N.Y. July 29, 2016).

⁴³ *Id.* at 7, 12.

⁴⁴ *Id.* at 13–14.

⁴⁵ *Id.* at 14–15.

⁴⁶ *Id.* at 30–31.

⁴⁷ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012).

⁴⁸ *Id.* at 834.

⁴⁹ *Id.* at 834–35.

⁵⁰ *Id.* at 835.

⁵¹ *Id.* at 840–41.

hybridwraps are becoming increasingly popular, but they also pose many concerns.

C. Lowering Mutual Assent Requirements

As wrap contract law continues to develop, several worrisome trends grow alongside it. When courts rely heavily on constructive notice to derive mutual assent, it undermines the foundational theories of contract law.⁵² Despite the well-known fact that no one reads⁵³ or understands⁵⁴ online terms, nor realistically could do so if they wanted to,⁵⁵ courts have consistently placed the burden of reading and understanding terms of use on the consumer by applying constructive notice liberally.⁵⁶

⁵² KIM, *supra* note 8, at 16. (“The problem with wrap contracts is that they fail on the level of doctrine[.]”).

⁵³ See generally Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, <http://ssrn.com/abstract=2757465> (Aug. 24, 2016) (finding 74% of study participants did not read agreement in which they agreed to give the company their first-born child).

⁵⁴ See Meyer v. Kalanick, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *32–33 n.11 (S.D.N.Y. July 29, 2016) (quoting “Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers,” Consumer Protection Financial Bureau, Mar. 10, 2015, <http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers>.) (“Over three quarters of those who said they understood what arbitration is acknowledged they did not know whether their credit card agreement contained an arbitration clause. Among consumers whose contract included an arbitration clause, fewer than 7 percent recognized that they could not sue their credit card issuer in court.”).

⁵⁵ KIM, *supra* note 8, at 213 (citing Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4:3 I/S: A J. OF LAW AND POL’Y 540, 562 (2008)) (“One study estimated that it would cost the average American Internet user 201 hours or the equivalent of \$3,534 a year to read the privacy policies of each website that he or she visits.”).

⁵⁶ See Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1179 (9th Cir. 2014) (“[F]ailure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract[.]”).

This becomes particularly salient when consumers unknowingly give up important rights.⁵⁷ Because corporations draft wrap contracts, they generally contain clauses that favor the company's interest over consumers who have very little, if any, opportunity to negotiate.⁵⁸ Major difficulties, and much litigation, arise when consumers agree to binding arbitration by implicitly agreeing to Conditions of Use and thereby denying courts any jurisdiction.⁵⁹ When combined with class action bans, mandatory arbitration clauses become particularly troublesome for consumers.⁶⁰ The purpose of class action is to "allow[] people who lost small amounts of money to join together to seek relief."⁶¹ However, if the plaintiffs are forced out of court and into arbitration, they can lose their class action status, and the litigation is often no longer cost effective for the plaintiff.⁶²

Moreover, although not much information exists on the arbitration proceedings themselves,⁶³ arbitrators are often biased in

⁵⁷ See Emily Canis, *One "Like" Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. C.R. L.J. 127, 135 (2015) ("[P]eople are frequently at risk of entering into mandatory arbitration agreements without even knowing it, simply by interacting on one of these Internet applications.").

⁵⁸ See KIM, *supra* note 8, at 21, 26; Cheryl Preston, *Please Note: You Have Waived Everything: Can Notice Redeem Online Contracts?* 64 AM.U.L. REV. 535, 536 ("Wrap contracts are merely the means for powerful contract drafter to legislate legal results."); Canis, *supra* note 57, at 154 ("While [clickwrap and browsewrap agreements] were initially fair to both companies and consumers, these concepts have also evolved into a dangerous mechanism where companies can control consumers' legal rights without a consumer ever realizing.").

⁵⁹ See, e.g., *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 147–48 (E.D.N.Y. 2015).

⁶⁰ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015) http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 ("By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination[.]").

⁶¹ *Id.*

⁶² See *id.* ("Roughly two-thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration").

⁶³ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015),

favor of the companies, and there are limited procedural safeguards in place for consumers.⁶⁴ Most often, plaintiffs decide not to pursue their claims, accepting the corporations' desired outcome.⁶⁵ While mandatory arbitration clauses and class action bans have been struck down as unconscionable,⁶⁶ the Supreme Court recently, in a string of cases,⁶⁷ strengthened the validity of arbitration clauses,⁶⁸ stating "courts must 'rigorously enforce' arbitration agreements according to their terms[.]"⁶⁹ The use of arbitration clauses and class-action bans by corporations has continued to increase.⁷⁰ When the rise of arbitration clauses is coupled with a reduction in consumer negotiating power, the result is consumers involuntarily giving away their right for their grievances to be heard in a court of law.⁷¹

III. HYBRIDWRAP'S LEGAL UTILITY (OR LACK THEREOF)

While formulating a hybridwrap framework for scenarios "in between" clickwrap and browsewrap may make intuitive sense,

<http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> ("Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported.").

⁶⁴ See *id.*

⁶⁵ See Silver-Greenberg & Gebeloff, *supra* note 60.

⁶⁶ See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (discussing other cases in which mandatory arbitration clauses and class action bans were struck down).

⁶⁷ See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility*, 131 S. Ct. 1740.

⁶⁸ See Silver-Greenberg & Gebeloff, *supra* note 60 (finding 83% of class action bans were upheld in 2014); see also Canis, *supra* note 57, at 144 (discussing how these Supreme Court cases do not favor consumers).

⁶⁹ *Italian Colors Rest.*, 133 S. Ct. at 2309 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

⁷⁰ Canis, *supra* note 57, at 128 ("For many of these clickwrap agreements, it is quite common for companies to try to include a provision that mandates forced arbitration.").

⁷¹ See generally Silver-Greenberg & Gebeloff, *supra* note at 60 (discussing the shrinking consumers' ability to litigate in court due to the rise in mandatory arbitration clauses).

hybridwrap fails both doctrinally and practically. Since the determinative fact in all wrap cases is whether there is a manifestation of mutual assent, adding another category of “hybridwrap” is, at best, simply a label acknowledging that the case is unclear as a matter of law on these facts. In opinions and briefs, courts and parties already take inordinate amounts of space to distinguish between the wrap labels instead of focusing on mutual assent, and creating a hybridwrap fosters this. Hybridwrap encourages courts to further unmoor contracts from mutual assent by introducing the binding power of clickwrap into the ambiguity of browsewrap. Overall, courts should reject hybridwrap terminology, and focus on manifestation of mutual assent.

A. Despite the Labels, There Is One Test: Manifestation of Mutual Assent

Before browsewrap or clickwrap even existed, manifestation of mutual assent formed the basis for all contracts.⁷² All wrap cases ultimately are determined by the presence of mutual assent.⁷³ The presumptive validity of clickwrap agreements does not stem from the designation of “clickwrap”; rather, whenever a fact pattern matches the clickwrap paradigm by presenting the terms of agreement and requiring a purposeful action for assent, those facts conclusively meet the requirements for a manifestation of mutual

⁷² *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (citing RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981)) (“Mutual manifestation of assent . . . is the touchstone of contract.”); *see also supra* Section II.A.

⁷³ For example, in *Register.com v. Verio, Inc.* the Second Circuit unusually enforced a “browsewrap” agreement because it found mutual assent. *Register.com Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004). The offeree, Verio, consistently used the offeror’s website, Register.com, for business purposes in a way that violated the terms of use. *Id.* at 396–97. After each business use of the website, Verio received notice of the terms and conditions, and thus Verio argued that they were not binding because the terms were not available before the transaction. *Id.* at 402. The court, however, found that Verio had sufficient notice because of its continued, regular use after receiving actual notice of the terms. *Id.* at 401.

assent.⁷⁴ Similarly, browserwraps are not generally invalid agreements because of the label; browserwrap fact patterns do “not require the user to manifest assent to the terms and conditions expressly.”⁷⁵ Thus, if a court were to apply hybridwrap, the court would simply note that the facts do not meet the strict definition of either clickwrap or browserwrap, and then proceed to conduct the same search for a manifestation of mutual assent that it would have regardless.

The Second Circuit perfectly demonstrated this concept in *Nicosia v. Amazon.com*. The court noted that while Nicosia argued only browserwrap principles apply, Amazon and the district court maintained this was “something in between.”⁷⁶ The Second Circuit assumed without deciding that hybridwrap should apply,⁷⁷ but instead of focusing on the specific type of agreement, the court, relying on precedent, focused on the notice to the reasonably prudent offeree and manifestations of assent.⁷⁸ The Second Circuit had the flexibility to assume without deciding that hybridwrap applied because that determination was ultimately irrelevant to the case.⁷⁹

Nevertheless, the increased acceptance by courts of browserwraps resembling clickwraps is not contingent upon the labels themselves. Rather, the more a browserwrap resembles a clickwrap, the more likely it is to contain the requisite

⁷⁴ See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (quoting *Register.com*, 356 F.3d at 429).

⁷⁵ *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (quoting *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366–67 (E.D.N.Y. 2009)).

⁷⁶ *Nicosia*, 834 F.3d at 235.

⁷⁷ *Id.* at 236.

⁷⁸ *Id.* (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012)) (“[I]n cases such as this, where the purported assent is largely passive, and the contract-formation question will often turn on whether a reasonably prudent offeree would be on inquiry notice of the term at issue.”); see also *Nguyen*, 763 F.3d at 1177 (“[T]he validity of the browserwrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”).

⁷⁹ See *Nicosia*, 834 F.3d at 236.

manifestation of mutual assent through constructive notice that courts always look for in browsewrap scenarios.⁸⁰ Ultimately, “all these labels can take courts only so far,”⁸¹ for most cases will fall somewhere in between browsewrap and clickwrap, requiring fact-based inquiries that defy bright-line rules.⁸² Therefore, regardless of how a court classifies a fact pattern, the court’s finding will be determined by the manifestation of assent by the reasonably prudent offeree.⁸³ However, courts, and consequently litigating parties, focus too much on the wrap labels before reaching the underlying issues.

B. Examples of Overemphasis on Wrap Labels

When analyzing wrap contracts, courts and parties often rhetorically overemphasize where the facts of the case fall on the browsewrap/clickwrap spectrum. The *Nicosia* district court opinion, and the parties’ briefs on appeal, exemplifies this trend. The district court decided that Amazon’s terms of use constituted a hybridwrap because the court assumed consumers automatically

⁸⁰ See, e.g., *id.* at 233 (citing *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002)) (“In determining the validity of browsewrap agreements, courts often consider whether a website user has actual or constructive notice of the conditions.”); *In re Zappos.com*, 893 F. Supp. 2d 1058, 1063–64 (D. Nev. 2012) (“[T]he determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website’s terms and conditions.”).

⁸¹ *Meyer v. Kalanick*, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *21 (S.D.N.Y. July 29, 2016).

⁸² *Id.* at 30.

⁸³ See *Nguyen*, 763 F.3d at 1176–77 (“[W]hether the website puts a reasonably prudent user on inquiry notice of the terms of the contract . . . depends on the design and content of the website and the agreement’s webpage.”); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (“[T]he contract-formation question will often turn on whether a reasonably prudent offeree would be on inquiry notice of the term at issue.”); *Meyer*, 2016 U.S. Dist. LEXIS 99921, at *30 (quoting *Specht*, 306 F.3d at 35) (“Consequently, courts must embark on a ‘fact-intensive inquiry,’ in order to make determination about the existence of ‘[r]easonably conspicuous notice’ in any given case”).

agreed to the terms when they placed their order.⁸⁴ In doing so, the court failed to assess whether consumers had sufficient notice that the clicking of the “Place your order” button would be a manifestation of assent.

Likewise, appellant Nicosia’s brief demonstrated a misconception of wrap contract formation.⁸⁵ Nicosia repeatedly and prominently based his argument on whether the court should apply browsewrap or clickwrap “principles” and “rules,” arguing that the court should only rely on browsewrap precedent while clickwrap cases should be excluded from consideration.⁸⁶ In his argument, Nicosia spends unnecessary time distinguishing between clickwrap and browsewrap instead of focusing on the actual dispositive issue of mutual assent.⁸⁷ Similarly, Amazon also missed the point in its appellee brief by overemphasizing the act of clicking.⁸⁸ It is not the clicking itself that is important, even in a clickwrap analysis, but rather the clicking is important to the extent that it expressly manifests assent.

While the arguments in the party briefs are not important legal doctrine, they demonstrate the inefficiencies created by over-emphasizing labels. The parties waste valuable effort making legally insignificant distinctions instead of succinctly identifying and arguing the determinative legal issues, and the courts, as a

⁸⁴ *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 143, 151 (E.D.N.Y. 2015).

⁸⁵ See Reply Brief for Appellant at 4–13, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

⁸⁶ Brief for Appellant at 26, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (“C. The District Court Applied Inapposite Clickwrap Principles.”); Reply Brief for Appellant at 4, 8, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (“I. AMAZON CANNOT EXPLAIN AWAY THE DISTRICT COURT’S FAILRUE TO APPLY THIS COURT’S BROWSEWRAP RULES”; “II. CLICKWRAP PRINCIPLES DO NOT APPLY TO THIS CASE.”).

⁸⁷ See Brief for Appellant at 16–29, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); Reply Brief for Appellant at 4–11, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

⁸⁸ See Brief for Appellee at 28, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (“Plaintiff acknowledged agreement by affirmatively *clicking* to proceed with the transaction”).

result, must waste time wading through irrelevant arguments. Adopting hybridwrap as a form of contracting continues to fuel this focus on the including or excluding the correct “type” of legal precedent and principles instead of focusing on how the facts actually correspond to finding a manifestation of mutual assent.

C. Ill-Effects of Hybridwrap on Mutual Assent

Hybridwraps present solutions to problems that do not exist and exacerbate problems that do exist. The browsewrap doctrine is sufficient to resolve contract formation issues that fall short of full clickwrap, but attempting to merge clickwrap and browsewrap to cover ambiguous cases will result in misapplication of the law and greater inequity toward consumers.

Practically, there is no gap between clickwrap and browsewrap that hybridwrap needs to fill, because there is no situation where “clicking” without actual or constructive notice of an offer would be legally relevant. For example, in *Fteja v. Facebook*, the importance of clicking “Sign Up” turned on whether the user would have constructive notice that clicking would constitute assent.⁸⁹ If the user had no notice, then clicking to register would solely manifest intent to register.⁹⁰ However, because there was constructive notice, clicking to register unambiguously manifested assent.⁹¹ In the first scenario, the click is irrelevant; in the second scenario, the click is dispositive.

Furthermore, while the hybridwrap focus on the action of clicking should not add anything without proper notice, applying hybridwrap will confuse and bias courts into considering the click when the click should not be considered. Fundamentally, the hybrid approach blurs the line between actions manifesting assent and factors to be considered for notice. A user cannot manifest assent without proper notice,⁹² but allowing the courts to evaluate

⁸⁹ See *Fteja*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012).

⁹⁰ See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 29–30 (2d Cir. 2002).

⁹¹ *Fteja*, 841 F. Supp. 2d at 841.

⁹² *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 121 (2d Cir. 2012) (“As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence.”).

both the assenting act and notice simultaneously, as hybridwrap does, places the factual cart before the legal horse.⁹³

The ultimate question in wrap contract disputes is whether there was mutual assent. In clickwrap cases, the “clicking-action” constitutes an actual manifestation of assent, settling the issue. In a browsewrap analysis, the click itself does not increase or decrease the chances that the consumer had notice of the terms and should not be considered until after notice is established.⁹⁴ Thus, courts should continue to only refer to clickwrap and browsewrap fact patterns. Any cases that fall short of clickwrap should be handled as browsewrap where the court must find the reasonably prudent offeree would be put on constructive notice that the terms exist and an action will constitute assent. Adding another label does not help courts ascertain the existence of mutual assent.⁹⁵

Additionally, utilizing hybridwrap exacerbates the existing concerns about wrap contracts by functionally creating a presumption in favor of assent, thereby further weighting the scales against the consumer.⁹⁶ The question of whether there is a hybridwrap arises when there is a browsewrap with a little something extra—some extra action by the consumer that distinguishes it from a pure browsewrap case.⁹⁷ Since companies seeking to enforce the agreement will over-emphasize the action,⁹⁸ courts will be tempted to allow the action to bias their finding of notice.⁹⁹ Indeed, the Ninth Circuit observed that “[c]ourts have . . . been more willing to find that requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap

⁹³ See *Specht*, 306 F.3d at 29–30.

⁹⁴ See *id.*

⁹⁵ *Meyer v. Kalanick*, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *21–22 (S.D.N.Y. July 29, 2016).

⁹⁶ See *Preston*, *supra* note 58, at 536 (“Wrap contracts are merely the means for powerful contract drafter to legislate legal results.”).

⁹⁷ See *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835, 838 (S.D.N.Y. 2012).

⁹⁸ See Brief for Appellee at 20, 28, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

⁹⁹ See, e.g., *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 151–52 (E.D.N.Y. 2015).

agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.”¹⁰⁰

For the above reasons, this Recent Development will forgo use of the term “hybridwrap” as much as possible in favor of focusing on the core contracting terms of mutual assent and notice, and the district court on remand should do likewise. While browsewrap and clickwrap frameworks are crucial for defining the spectrum of mutual assent issues courts face, they should be used only as guideposts for orientating the court on the continuum of precedents. However, since most cases fall in the middle ground, courts should expeditiously move to evaluations of notice and intent to assent, which are the truly determinative criteria. Similarly, this Recent Development will continue to utilize the well-established terms of clickwrap and browsewrap, but the driving focus will be creating a framework through which to analyze the middle ground.

IV. *NICOSIA V. AMAZON.COM*: FACTS AND ARGUMENTS

This section examines the *Nicosia* case and how the district court and the Second Circuit differed in their analysis of mutual assent. After stating the facts and procedural history of the case, this section looks at what the district court found and why, and why the Second Circuit found that no enforceable contract existed.

A. *Facts & the District Court’s Decision*

In 2013, Nicosia purchased weight-loss pills on Amazon.com.¹⁰¹ However, these pills contained the chemical sibutramine, which the FDA withdrew from the market in 2010 because of negative health risks.¹⁰² Nicosia filed a class action suit against Amazon.com claiming violation of the Consumer Product Safety Act and seeking damages and an injunction against selling

¹⁰⁰ *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176–77 (9th Cir. 2014).

¹⁰¹ *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 226 (2d Cir. 2016).

¹⁰² *Id.* (“[T]he FDA advised physicians to stop prescribing sibutramine and to advise patients to cease its consumption due to its risks[.]”).

products with sibutramine.¹⁰³ In district court, Amazon moved to dismiss the case for failure to state a claim, arguing Amazon's Conditions of Use contained a mandatory arbitration clause and a class action ban.¹⁰⁴ Amazon claimed that Nicosia assented to the Conditions of Use when he made online purchases.¹⁰⁵ At the time of purchase, the checkout screen contained a link to the Conditions of Use and a statement reading, "By placing your order, you agree to Amazon.com's Conditions of Use."¹⁰⁶ The Conditions of Use included a mandatory arbitration provision and a class action waiver.¹⁰⁷ Amazon argued that clicking the "Place your order" button constituted agreement, per the hyperlink notice provided on

¹⁰³ *Id.* at 227; *see also* Consumer Product Safety Act, 15 U.S.C. §§ 2051–89 (2012).

¹⁰⁴ *Nicosia*, 834 F.3d at 226–27; *see also* FED. R. CIV. P. 12(b)(6).

¹⁰⁵ *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 151–52 (E.D.N.Y. 2015). Amazon also contended, and the district court agreed, that when setting up his Amazon account in 2008, Nicosia must have checked a box indicating he agreed with the Conditions of Use. *Id.* at 145. However, Nicosia maintained that he never created an account, never agreed to the 2008 Conditions of Use, and that Amazon had insufficient proof that he did. *Nicosia*, 834 F.3d at 227. The 2008 Conditions of Use did not have an arbitration clause, *id.*, but the 2008 Conditions of Use did state that Amazon "reserve[s] the right to make changes to . . . these Conditions of Use at any time," *Nicosia*, 84 F. Supp. 3d at 145. The district court found that Nicosia must have created an account and took that into consideration when evaluating the overall mutual assent. *Id.* at 151–52. The district court found this provided additional constructive notice to the later Conditions of Use. *Id.* But the Second Circuit held that it was improper to consider the creation of the account under the well-established standard for the motion to dismiss for failure to state a claim, which requires the court "accept[] all factual allegations as true, and draw[] all reasonable inferences in plaintiff's favor." *Nicosia*, 834 F.3d at 231–35. While the factual issue of whether Nicosia did explicitly agree to the Conditions of Use upon creating an account may ultimately be dispositive in this litigation, this Recent Development will exclusively focus on the possible mutual assent at the time of purchase.

¹⁰⁶ *Nicosia*, 84 F. Supp. 3d at 146; Brief for Appellee at 7, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

¹⁰⁷ *Nicosia*, 834 F.3d at 227 ("Any dispute or claim . . . will be resolved by binding arbitration, rather than in court We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class . . . action.").

the purchase page.¹⁰⁸ Nicosia, however, argued that the Conditions of Use were not enforceable because he never intended to assent to those terms; rather, he simply placed his order.¹⁰⁹

On these facts, the Eastern District of New York found there was a valid contract to arbitrate and thus granted Amazon's motion to dismiss for failure to state a claim.¹¹⁰ When evaluating whether Nicosia assented to the Conditions of Use, the district court applied a hybridwrap analysis.¹¹¹ The district court said that even though the Conditions of Use were only viewable through hyperlink (like a browwrap), the hyperlink was "conspicuous" and thus provided constructive notice.¹¹² Since the consumer received notice, he agreed to the condition by completing the purchase.¹¹³ Therefore, the mandatory arbitration clause and the class action waiver bound Nicosia.¹¹⁴

B. Second Circuit's Reasoning & Reversal

The Second Circuit found that the district court erred in granting the motion to dismiss for failure to state a claim.¹¹⁵ The court began its analysis by reviewing the pertinent case law regarding wrap labels, but ultimately the court focused on the requirements of mutual assent: conspicuous notice and intent to assent.¹¹⁶ The court determined that the facts in this case did not conform to either the traditional clickwrap or browwrap

¹⁰⁸ *Nicosia*, 84 F. Supp. 3d at 150.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 144.

¹¹¹ *Id.* at 151–52 (quoting *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176–77 (9th Cir. 2014)) ("Courts have . . . been more willing to find that requisite notice for constructive assent where the browwrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.").

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 151–53.

¹¹⁵ *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 234–35, 238 (2d Cir. 2016).

¹¹⁶ *Id.* at 232–33.

definitions.¹¹⁷ Thus, “assum[ing] without deciding that the agreement was a hybrid between a clickwrap and a browsewrap agreement,” the court proceeded to use the reasonably prudent offeree test, requiring notice of the Conditions of Use and assent to those Conditions.¹¹⁸

Thus, the determinative issue before the court was whether Nicosia had constructive notice of the Conditions of Use.¹¹⁹ On that issue, the court held that Amazon failed to show that Nicosia was on notice and that he assented to the Conditions of Use.¹²⁰ The court stated that constructive notice “depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous.”¹²¹ Focusing on the facts, the court first noted that the “critical sentence” was in a smaller font than the rest of the page.¹²² Moreover, the court stressed that there were many items on the page competing for the user’s attention,¹²³ and

¹¹⁷ *Id.* at 233, 236.

¹¹⁸ *Id.* at 236 (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012)) (“[I]n cases such as this, where the purported assent is largely passive, and the contract-formation question will often turn on whether a reasonably prudent offeree would be on inquiry notice of the term at issue.”); *see also* *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (“[T]he validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract.”).

¹¹⁹ *Nicosia*, 834 F.3d at 235.

¹²⁰ *Id.* at 237–38.

¹²¹ *Id.* at 233 (citing *Nguyen*, 763 F.3d at 1177–78).

¹²² *Id.* at 236.

¹²³ Here the court listed the facts that it found legally relevant. *Id.*

“Turning to the Order Page, we are not convinced that notice was sufficient as a matter of . . . law Among other things, users are shown their shipping address, billing address, and payment method, and given the option to edit that information or ‘try Amazon Locker.’ Users are also given the opportunity to change the delivery date, enter gift cards, and promotional codes, and sign up for ‘FREE Two-Day Shipping’ four times in the center of the page, appearing in orange, green, and black fonts, and white font against an orange banner [A] ‘Place your order’ button above a box with the heading ‘Order Summary.’ The Order Summary box lists the cost of the items to be purchased, shipping and handling costs, total price before tax, estimated tax to be collected, purchase total, gift card amount, and

the notice itself, which was not bold or capitalized, was not reasonably conspicuous compared to the other distracting elements on the webpage.¹²⁴ Therefore, the court concluded that the district court erred in finding Nicosia had failed to state a claim.¹²⁵

The Second Circuit did not decide the hybridwrap issue or whether Nicosia manifested mutual assent. Instead, the court vacated and remanded the case because “reasonable minds could disagree on the reasonableness of the notice.”¹²⁶ By simply assuming the validity and existence of a hybridwrap and not making a holding on the ultimate assent issue, the Second Circuit left these questions open for discussion at the lower court on remand.¹²⁷ To make a decision regarding the manifestation of assent in this case, the district court will need to adopt a framework for analyzing the facts of this case. The next sections lay out what this framework should be.

V. CREATING A COMMON LAW PRESUMPTION AGAINST ASSENT

Regardless of whether courts reject the hybridwrap label, the courts must determine how to equitably apply the common law of contracts to fact patterns with ambiguous mutual assent. Currently, courts use the reasonably prudent offeree standard to assess whether there would be notice. Determining who is the “reasonable person” is impossible to precisely define, as every first-year law student learned in torts, but in light of well-established facts that no one does or can read all of the terms and conditions they encounter,¹²⁸ courts should reevaluate the capabilities of the

order total. The words ‘Order total’ appear in bold, red font Near the bottom of the page, there are a number of sentences in faint, black font directing users to links to other Amazon webpages for additional information, such as tax and seller information, customer assistance pages, and product returns policies. At the very bottom of the page, links to the Conditions of Use and Privacy Policy appear again in blue.”

¹²⁴ *Id.* at 236–37.

¹²⁵ *Id.* at 226.

¹²⁶ *Id.* at 237–38; *see also* FED. R. CIV. P. 12(b)(6).

¹²⁷ *Nicosia*, 834 F.3d at 235–36, 238.

¹²⁸ *Supra* Section II.C.

reasonably prudent offeree to bring wrap contracts more in line with contract doctrine.¹²⁹

A. Defining a Presumption Against Assent

The legal reasonably prudent offeree should move closer to reality by courts beginning with the rebuttable presumption that there is no mutual assent. In cases where mutual assent is at issue, courts should presume that (1) consumers will not have notice of the terms and conditions, and (2) consumers will not have notice that their conduct will constitute acceptance of those terms.¹³⁰ Adopting these presumptions would require courts to critically evaluate whether the crucial elements of mutual assent were satisfied by the facts presented.¹³¹

The notice of terms must be conspicuous.¹³² In *Specht*, the inconspicuousness of the terms of agreement was dispositive.¹³³ The website had a hyperlink to the terms at the very bottom of the webpage, far enough below the download button to where the plaintiffs would have had to scroll down in their web browser to see the notice.¹³⁴ Because there was not “immediate visible notice” of the terms, the reasonably prudent offeree would not have known

¹²⁹ See Preston, *supra* note 58, at 575 (“Courts certainly can, and should, increase the scrutiny and develop common law standards of fairness in the online context.”).

¹³⁰ See Meyer v. Kalanick, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *31 (S.D.N.Y. July 29, 2016) (“[T]he Uber registration screen . . . did not adequately call users’ attention to the existence of the Terms of Service, let alone to the fact that, by registering to use Uber, a user was agreeing to them.”).

¹³¹ RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (AM. LAW INST. 1981) (“The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”).

¹³² *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002) (“Clarity and conspicuousness of arbitration terms are important in securing informed consent.”); see also *Conspicuous*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[C]learly visible or obvious. Whether a printed clause is conspicuous as a matter of law usually depends on the size and style of the typeface.”).

¹³³ *Specht*, 306 F.3d at 31.

¹³⁴ *Id.* at 23–24.

about the terms.¹³⁵ Generally, even if the notice is present on the consumer's screen, it may not be conspicuous, for the terms must stand out based on the website design.¹³⁶ When considering whether the consumer will direct their attention to the notice, the court should consider what other elements are competing for the consumer's limited attention.¹³⁷ In other words, compared to the other elements on the webpage, there must be reason to believe that the notice would garner the attention of the reasonably prudent offeree. In *Nicosia*, the Second Circuit observed that the notice of the Conditions of Use were not "conspicuous in light of the whole page" because the notice was not bold or capitalized, while the rest of the page was full of links and advertisements with more attention-grabbing colors, positions, and fonts."¹³⁸

In *Meyer*, the court evaluated the relative conspicuousness of the notice by comparing the visual prominence of the Terms of Service with the other "very user-friendly and obvious" elements on the screen.¹³⁹ The court found that the notice on the Uber app was not "likely to disrupt viewers' experiences in some way and draw their attention to the terms and conditions"¹⁴⁰ Although the terms were listed right under the "Register" button, the notice was "barely legible" and there was nothing otherwise drawing attention to the terms.¹⁴¹ Rather, the court concluded that the app creators designed the visual layout to encourage the consumer to register without noticing the terms of agreement.¹⁴² *Meyers* demonstrates how the presumption against notice would be applied. Instead of simply relying on the existence of the notice on

¹³⁵ *Id.* at 20, 31.

¹³⁶ *See* *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176–78 (9th Cir. 2014).

¹³⁷ *See* *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 237 (2d Cir. 2016).

¹³⁸ *Id.* at 236–37.

¹³⁹ *Meyer v. Kalanick*, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *21–22 (S.D.N.Y. July 29, 2016) (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)).

¹⁴⁰ *Id.* at 28–29 (quoting *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015)).

¹⁴¹ *Id.* at *13–15.

¹⁴² *Id.* at *31.

the webpage, the court should compare the relative conspicuousness of the notice to other elements of the webpage and require that the notice be as equally conspicuous as other hyperlinks and ads. If the notice would not reasonably disrupt the consumer's attention, the court should find there was no notice.¹⁴³

Once notice of the terms is established, courts should require companies to provide evidence of clear and parallel wording between the written notice and the action taken, which results in consumers having notice that their conduct will constitute acceptance of those terms.¹⁴⁴ For example, in *Fteja v. Facebook*, the court found that the user did have notice that his actions constituted assent because the notice of terms mentions "By Signing Up", and the relevant button said "Sign Up."¹⁴⁵ In contrast, in *Meyer v. Kalanick*, the court found that "the registration screen here does not contain parallel wording as between the 'Register' button and the statement 'By creating an Uber account, you agree to the Terms of Service & Privacy Policy.'"¹⁴⁶ This rule would not require the same express assent required by clickwrap, but it ensures that the reasonably prudent offeree can quickly and clearly understand what actions constitute assent.¹⁴⁷

Additionally, courts should suspiciously view any supposed actions manifesting assent that the consumer would have made regardless of whether he actually intended to assent. For example, a consumer on Amazon.com would click the "Place your order" button independent of any intent to consent to the terms.¹⁴⁸ When a

¹⁴³ See *id.* at *28–29.

¹⁴⁴ *Id.* at *30 (citing *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 373–74 (E.D.N.Y. 2015)).

¹⁴⁵ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834–35 (S.D.N.Y. 2012).

¹⁴⁶ *Meyer*, 2016 U.S. Dist. LEXIS 99921, at *30 (citing *Berkson*, 97 F. Supp. 3d at 373–374).

¹⁴⁷ See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016) (citing *Register.com Inc., v. Verio, Inc.*, 356 F.3d 393, 402–03, 429, n.41 (2d Cir. 2004)) ("Notably, unlike typical 'clickwrap' agreements, clicking 'Place your order' does not specifically manifest assent to the additional terms, for the purchaser is not specifically asked whether she agrees or to say 'I agree.'").

¹⁴⁸ See *Nicosia*, 834 F.3d at 236–37 (citing *Fteja*, 841 F. Supp. 2d at 835, 840) ("Nothing about the 'Place your order' button alone suggests that additional

button or action serves the dual purpose of manifesting assent and furthering a different objective, there is a greater risk that the consumer exclusively intended the non-assenting result.¹⁴⁹ Thus, courts should presume that the consumer solely intended to achieve the other objective unless there is clear notice and parallel wording. But, as occurred in *Facebook v. Fteja*, if the notice is relatively conspicuous and clearly indicates that the clicking action will constitute assent, then a finding of manifestation of mutual assent is warranted.¹⁵⁰

B. Benefits of a Presumption Against Assent

Adopting a presumption against assent is good for both policy and practical reasons. There are two primary doctrinal and policy reasons for government enforcement of contracts: protection of individual rights and promotion of utilitarian goals.¹⁵¹ Individual rights theories promote individual autonomy, self-governance, and self-determination through contracting, whereas utilitarian theories focus on the social benefits from contracting.¹⁵² First, the central premise of an individual rights theory is that “contracts should promulgate the intent of the parties and ensure the security of transactions.”¹⁵³ However, without valid consent under the individual rights theory, “judicial enforcement of contracts is state

terms apply, and the representation of terms is not directly adjacent to the ‘Place your order’ button so as to indicate that a user should construe clicking as acceptance.”); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 20, 29–30 (2d Cir. 2002) (“[C]licking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.”).

¹⁴⁹ *Meyer*, 2016 U.S. Dist. LEXIS 99921, at *32 (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127–28 (2d Cir. 2012) (“There is a real risk here that Uber’s registration screen ‘made joining [Uber] fast and simple and made it appear—falsely—that being a [user] imposed virtually no burdens on the consumer besides payment.’”)).

¹⁵⁰ *Fteja*, 841 F. Supp. 2d at 840 (“Fteja was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences.”).

¹⁵¹ *KIM*, *supra* note 8, at 8–9.

¹⁵² *Id.* at 9–10.

¹⁵³ *Id.* at 212.

coercion.”¹⁵⁴ Thus, as courts continue to validate wrap contracts that stretch the definition of assent, they stretch the legitimacy of contract law itself.¹⁵⁵

Second, the idea that contracts serve a utilitarian purpose in a market economy is premised on the condition that each party will only enter into deals that benefit them and thereby benefit society.¹⁵⁶ However, if one party is ignorant of the agreement or, similarly, if a party has no power to negotiate within a market, then there is no structural guarantee that the agreements will, on the whole, be net beneficial for society.¹⁵⁷ Widespread use of constructive notice means that fewer consumers are genuinely participating in the contracting process in a way that yields the benefits envisioned by the individual rights and utilitarian theories.¹⁵⁸ While efficient wrap contracts are necessary in a fast moving industrial and information economy,¹⁵⁹ if courts allow the law to stray too far from its doctrinal underpinnings, then these wrap contracts will no longer be beneficial.¹⁶⁰ To protect consumer’s individual rights and promote economic flourishing, courts must ensure there is true mutual assent by adopting a rebuttable presumption against assent in online contracting.

¹⁵⁴ *Id.* at 211.

¹⁵⁵ *Id.* at 194.

¹⁵⁶ *Id.* at 29 (“Contracts are supposed to be economically efficient because the parties are in the best position to assess the value of a particular good or service—its ‘value.’ Parties are presumed to have entered into contracts after assessing the risks and benefits of a transaction. Their objective is to maximize the surplus that the deal can create.”).

¹⁵⁷ *Id.* at 30.

¹⁵⁸ *Id.* at 174–75.

¹⁵⁹ *Id.* at 20–21. (“As mass market sales became possible with industrialization, so did mass consumer form contracts Simplifying the contracting process by discouraging or even preventing negotiations shortens the time from transaction inception to completion. Given the impracticability of negotiating, modifying, or even discussing contractual terms with each of their consumers, companies found it much more convenient and efficient to create standard terms for standard business transactions.”).

¹⁶⁰ *Id.* at 211.

A critique is that increasing the notice requirements will not make more consumers read terms of use or really understand the agreement that they are making.¹⁶¹ However, it does a better job of notifying the consumer that they are making an agreement. Over time, as courts require more assent, there will be more opportunities for consumers and consumer advocates to effect change.¹⁶² Another potential issue is that requiring more assent places a larger burden on businesses and creates more friction in commercial transactions.¹⁶³ However, the policy requirements that require clearer manifestations of mutual assent outweigh the burdens on business. Browsewrap agreements are inefficient for businesses because they run a high risk of being unenforceable.¹⁶⁴ Additionally, the analysis of browsewrap agreements is more difficult for courts than the relatively straightforward clickwrap analysis.¹⁶⁵ Thus, businesses and courts would benefit from increased certainty judicial efficiency.¹⁶⁶ By requiring companies to

¹⁶¹ Preston, *supra* note 58, at 536.

¹⁶² But see Florencia Marotta-Wurgler, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 6, 32-33 (January 2014) (“[T]he primary cost facing consumers is in reading and comprehending contract terms[.]”).

¹⁶³ KIM, *supra* note 8, at 174-75; Florencia Marotta-Wurgler, *The Licensing of Intellectual Property: Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 167 (2011).

¹⁶⁴ BREHM, *supra* note 27, at 4 (citing *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *7 (N.D. Cal. June 25, 2014) (“Generally, courts have declined to enforce browsewrap agreements because the fundamental element of assent is lacking.”).

¹⁶⁵ See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016) (“While clickwrap agreements that display terms in a scrollbox and require users to click an icon are not necessarily required, they are certainly the easiest method of ensuring that terms are agreed to.”).

¹⁶⁶ Additionally, if companies are required to overcome an initial presumption, they will keep better records for evidence. For example, *Facebook* clearly proved that a user had to agree to the terms when creating an account. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834-35 (S.D.N.Y. 2012). On the contrary, Amazon was unable to prove Nicosia had agreed to clickwrap terms when creating his account, which could have resolved the issue much more expediently. *Nicosia*, 834 F.3d at 235, 237-38; see also *supra* note 106.

provide strong evidence of notice, businesses will have increased confidence that their agreements will be enforceable, like Facebook's agreement,¹⁶⁷ instead of unenforceable, like Uber's¹⁶⁸ and Amazon's.¹⁶⁹

As the general public accesses and utilizes new technology, the definition of the reasonably prudent offeree must also change to reflect new contract formation scenarios. As technological developments continue to push consumers further away from traditional consent models, establishing the presumption against notice becomes even more critical. Consumers will be entering into contracts via usage of the Internet of Things¹⁷⁰ or by interacting with companies in non-traditional contracting settings, such as social media.¹⁷¹ Overall, adopting a presumption against assent better reflects present reality and better equips courts for future changes.

C. Nicosia v. Amazon.com: Applying the Presumption against Assent

Because the Second Circuit only vacated the motion to dismiss and did not decide if there was a manifestation of mutual assent, the district court must determine how to evaluate the facts on remand.¹⁷² The district court should apply the presumption against assent, as discussed above, and find that there was no manifestation of mutual assent to the Amazon Conditions of Use.¹⁷³ The court should focus on the web design and the Nicosia's actions

¹⁶⁷ *Fteja*, 841 F. Supp. 2d at 834–35.

¹⁶⁸ *Meyer v. Kalanick*, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *13–14 (S.D.N.Y. July 29, 2016).

¹⁶⁹ *Nicosia*, 834 F.3d at 237.

¹⁷⁰ See generally Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839 (2016). Internet of Things (“IoT”) is a generic phrase describing the growing number of internet-connected consumer devices, ranging from smartphones to smart thermostats.

¹⁷¹ See generally Canis, *supra* note 57.

¹⁷² *Nicosia*, 834 F.3d at 237–40.

¹⁷³ As of the writing of this Recent Development, the district court has not yet ruled on remanded.

to determine (1) if the notice was relatively conspicuous and (2) whether Nicosia intended to assent by placing his order.

First, the district court should evaluate the conspicuousness of notice of Conditions relative to the other elements the Amazon purchase page to determine if the consumer's experience would have been disrupted. When Nicosia made his purchases in 2013, the checkout screen contained a standard blue underlined hyperlink to the Conditions of Use and a statement reading, "By placing your order, you agree to Amazon.com's Conditions of Use."¹⁷⁴ The hyperlink was located at the very bottom of the page and was set in a smaller type than other text on the page.¹⁷⁵ As noted by the Second Circuit, the Amazon purchase page contained a myriad of other colorful, prominent, attention-grabbing advertisements and hyperlinks.¹⁷⁶ Notably, the "Place your order" button was located in an "Order Summary" box, which contained information directly to the order being placed.¹⁷⁷ However, while the Conditions of Use directly relate to the sale, they are not located within this box.¹⁷⁸ Instead, the Conditions of Use were placed at the bottom of the page with hyperlinks to Amazon webpages.¹⁷⁹

Based on these facts, the district court should hold that the notice of the Conditions of Use was relatively not conspicuous. In *Meyer v. Kalanick*, the court remarked that, based on the design of the registration and the relative inconspicuousness of the notice, the corporation likely hoped the consumer's experience would not

¹⁷⁴ *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 146 (E.D.N.Y. 2015); Brief for Appellee at 7, 26, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); *see also supra* note 124.

¹⁷⁵ *Nicosia*, 834 F.3d at 236–37; Brief for Appellant at 22, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

¹⁷⁶ *Nicosia*, 834 F.3d at 236–37.

¹⁷⁷ *Id.* ("The Order Summary box lists the cost of the items to be purchased, shipping and handling costs, total price before tax, estimated tax to be collected, purchase total, gift card amount, and order total. The words 'Order total' appear in bold, red font.").

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

be “disrupted” by the formal notice.¹⁸⁰ Likewise, here, there are many other advertisements and programs that Amazon is trying to promote to the consumer, as demonstrated by the bold, colorful advertisements. This contrasts sharply with the smaller text of the notice, which strongly implies a de-emphasizing purpose. Furthermore, the Conditions of Use should have been placed within the “Order Summary” box with the rest of the relevant order information. The proximity and logical topical grouping of order related material to the “Place your order” button would have placed the reasonably prudent offeree on constructive notice. But, by segregating the Conditions of Use from the clearly labeled order material, the website design misleads the consumer into concluding all of the notices are in that box.¹⁸¹ Had Amazon made the text the size of the average text on the page and placed the notice within the “Order Summary” box, the notice would be relatively conspicuous on the page and would overcome the first element of the presumption assent. Since Amazon did not take this approach, the district court should find the notice was not relatively conspicuous and, thus, there is no manifestation of mutual assent.

Second, if the district court were to find that Nicosia had constructive notice of the Conditions of Use, Amazon would need to overcome the presumption that Nicosia’s action of placing the order did not constitute an intention to manifest assent. Because the proposed mechanism for manifesting intent assent is also the “Place your order” button, the district court must determine whether Nicosia intended both to assent and place his order or just simply to place his order.¹⁸² In *Specht*, the court noted that

¹⁸⁰ *Meyer v. Kalanick*, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *31 (S.D.N.Y. July 29, 2016).

¹⁸¹ *Id.* at *32 (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127–28 (2d Cir. 2012)) (“There is a real risk here that Uber’s registration screen ‘made joining [Uber] fast and simple and made it appear—falsely—that being a [user] imposed virtually no burdens on the consumer besides payment.’”).

¹⁸² Indeed, this is exactly what Nicosia argued to the Second Circuit. Reply Brief for Appellant at 9, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (“[C]licking ‘Place your order’ accomplishes only what it says. It does not provide notice or form a valid agreement to arbitration using clickwrap.”).

“clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the button would signify assent to those terms.”¹⁸³

Here, while clicking “Place your order” is not an inherently equivalent manifestation of assent to clicking “I agree,”¹⁸⁴ the language of the notice closely parallels the language on the button, and thus the district court should find the presumption against finding an intent to assent is overcome.¹⁸⁵ In *Facebook v. Fteja*, the court found the user knew his click would constitute assent due to the close proximity and parallel language of the notice and the pertinent button.¹⁸⁶ Here, because the notice refers to “placing your order” and the button is similarly labeled “Place your order,” the reasonably prudent offeree would understand that clicking the “Place your order” button would constitute assent.¹⁸⁷

Overall, the district court should find that no binding contract exists because the reasonably prudent offeree would not have constructive notice of the Conditions of Use. Because the Conditions of Use are relatively inconspicuous on the page, the court cannot assume that the reasonably prudent consumer will be aware of them at the time of purchase. Without constructive notice, the consumer cannot have the knowledge that placing his order constitutes assent.

¹⁸³ *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30–31 (2d Cir. 2002).

¹⁸⁴ *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236–37 (2d Cir. 2016).

¹⁸⁵ This is still assuming the court had first found the presumption against notice was overcome. *See Schnabel*, 697 F.3d at 121 (“As a general principle, an offeree cannot actually assent to an offer unless the offeree knows of its existence.”); *see also supra* Section III.C (explaining that simultaneously evaluating notice and actions manifesting assent constitutes one of the major problems with hybridwrap).

¹⁸⁶ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835, 840 (S.D.N.Y. 2012) (finding the intent to assent criteria was satisfied because the notice language explicitly stated assent would be manifest “By clicking Sign Up” and the button was labeled “Sign Up”).

¹⁸⁷ Ideally, the notice would state, “by clicking place your order” in order to be completely unambiguous. However, the language does not need to be verbatim to satisfy the reasonably prudent offeree standard.

VI. CONCLUSION

“[T]here is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for a manifestation of mutual assent But that would be too cynical and hasty a view, and certainly not the law.”¹⁸⁸ Because contract law is predicated on manifestations of mutual assent, courts must endeavor to faithfully protect and apply that doctrine. While it is difficult for courts, consumers, and businesses alike to determine how we should expect a reasonable consumer to act, the difficulty alone is not a reason not to try. Overall, courts have little to gain and much to lose from adding hybridwrap as a category of wrap contracts. Instead of adopting the ill-advised hybridwrap framework, courts should protect individuals from losing important rights, especially when those individuals are simply engaging the modern information economy. Moving forward, courts need to figure out how to return manifestation of mutual assent to central prominence in contract formation, and ascertain how it applies in the “middle ground” cases. Adopting presumptions that favor strong mutual assent requirements will not only protect consumers, but also protect contracting in the 21st century.

¹⁸⁸ Meyer v. Kalanick, 15 Civ. 9796 2016 U.S. Dist. LEXIS 99921, at *34–35 (S.D.N.Y. July 29, 2016).